

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of the Commercial Spectrum)	
Enhancement Act and Modernization of the)	WT Docket No. 05-211
Commission's Competitive Bidding Rules and)	
Procedures)	

JOINT COMMENTS

The Wireless Communications Association International, Inc. ("WCA"), the National ITFS Association ("NIA") and Catholic Television Network ("CTN," with WCA, NIA and CTN hereinafter referred to as the "Joint Parties") hereby submit their joint comments in response to the Commission's *Further Notice of Proposed Rulemaking* ("FNPRM") in the above-captioned proceeding.¹

The Joint Parties' interest in the *FNPRM* stems from the potential for confusion between this proceeding and WT Docket No. 03-66, in which the Commission's *Further Notice of Proposed Rulemaking* for the latter has solicited and received substantial comment on the rules and policies to govern a future auction of Educational Broadband Service ("EBS") spectrum in the 2.5 GHz band in those areas of the country where the spectrum remains unlicensed (the "EBS White Space Auction").²

¹ FCC 06-8 (rel. Feb. 3, 2006).

² See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 14165, 14265-67 (2004) ["2.5 GHz R&O and FNPRM"]. WCA is the trade association of the wireless broadband industry. Its members include, *inter alia*, Broadband Radio Service ("BRS") and EBS licensees and channel lessees, operators of virtually all broadband systems that utilize BRS and EBS (continued on next page)

Appropriately, the *FNPRM* here does not suggest that any of the Commission's proposed modifications to its eligibility requirements for "designated entities" ("DEs") will result in the award of bidding credits to any participants in the EBS White Space Auction – an issue that is being debated in WT Docket No. 03-66. Hence, to ensure that the *FNPRM* does not create any unnecessary confusion over the matter, the Joint Parties ask the Commission to confirm that the proposals in the *FNPRM* are not directed at the EBS White Space Auction, and that resolution of all bidding credit and other competitive bidding issues pertaining to that auction will be addressed in WT Docket No. 03-66.

Alternatively, if the Commission nonetheless decides to address the issue here, it should reaffirm its prior finding that bidding credits should not be available for auctions of EBS spectrum. As NIA and CTN have previously advised the Commission, "traditional auction concepts supporting the bids of so-called designated entities have no proper application in [the auction of EBS white space]."³ The Commission clearly has substantial discretion under Section 309(j) of the Communications Act to develop approaches for assisting designated

spectrum in the United States, equipment manufacturers and engineering consultants. NIA, established in 1978, is a non-profit, professional organization of EBS licensees, applicants and others interested in the EBS. The goals of NIA are to gather and exchange information about EBS, to act as a conduit for those seeking information or assistance about EBS, and to represent the interests of EBS licensees and applicants. CTN is an association of Roman Catholic archdioceses and dioceses that operate many of the largest parochial school systems in the United States. CTN's members use EBS frequencies to distribute educational, instructional, inspirational, and other services to schools, colleges, parishes, community centers, hospitals, nursing homes, residences and other locations, and collectively serve over 500,000 students and 4,000,000 households throughout the country. *See also, e.g.*, Joint Comments of Catholic Television Network and National ITFS Ass'n, WT Docket No. 03-66, at 15-16 (filed Jan. 10, 2005) ["NIA/CTN WT Docket No. 03-66 FNPRM Comments"]; Joint Reply Comments of Catholic Television Network and National ITFS Ass'n, WT Docket No. 03-66, at 10-14 (filed Feb. 8, 2005); Reply Comments of Wireless Communications Ass'n Int'l, WT Docket No. 03-66, at 30-32 (filed Feb. 8, 2005) ["WCA WT Docket No. 03-66 FNPRM Reply Comments"].

³ NIA/CTN WT Docket No. 03-66 FNPRM Comments at 15.

entities, and is under no obligation to issue bidding credits to EBS auction participants. The record before the Commission in WT Docket No. 03-66 establishes that:

The language in Section 309(j)(3)(B) . . . is focused on business entities: “the Commission shall promote ‘economic opportunity and competition . . . by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.” EBS eligible educational institutions, governmental agencies and non-profit educational groups are *not* “businesses” in any commonly understood use of that term. Nor are they *owned* by particular individuals or groups, as opposed to the public at large, as they do not issue stock or have other indicia of ownership.

Furthermore, [there is] no particular correlation between the size of an EBS eligible entity based on annual revenues or other similar financial factors and the likelihood of successful construction and operation of applied-for EBS stations. If anything, the entity most likely to be successful in applying for, constructing and operating white space EBS stations (which will generally function to extend service into outlying areas surrounding a given metropolitan area) will be a licensee that currently holds a license for the same channels in a nearby area. The size or other “business” characteristics of such an entity simply is not relevant.⁴

In other words, the notion of giving, for example, bidding credits to “small businesses” in no way advances the educational objectives of EBS. Indeed, application of small business bidding credits to EBS would produce absurd results. To cite just one possibility, a small not-for-profit corporation that is not accredited by any educational organization and that has no connection whatsoever to the Washington, DC area would be entitled to an auction advantage over any of the major universities located in the Washington, DC metropolitan area. While that result may be desirable for those associated with the not-for-profit corporation, one would be hard pressed to say that the public interest in education will be advanced by handicapping

⁴ *Id.* at 15-16 (emphasis in original).

local universities and other large educational institutions during any bidding process for EBS spectrum.

It therefore comes as no surprise that the Commission used much the same reasoning less than six years ago when it refused to extend bidding credits to participants in EBS (then known as ITFS) auctions:

We continue to believe that the new entrant bidding credit should not be applied in ITFS auctions, given the nature and purpose of that service. As explained in the *First Report and Order*, ITFS is a point-to-point or point-to-multipoint microwave service whose channels are allocated to educational organizations and are intended primarily for the transmission of instructional, cultural and other types of educational materials to enrolled students at accredited schools. Because ITFS is not a general interest consumer medium like the broadcast services, the goals underlying the new entrant bidding credit appear inapplicable to ITFS.⁵

Nothing about EBS today warrants a contrary finding.⁶

⁵ See *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings*, Memorandum Opinion and Order, 14 FCC Rcd 8724, 8767 (1999) [*ITFS Auction MO&O*]. Likewise, Section 73.5007 of the Commission's Rules, which formerly governed EBS auctions, did not provide for either small business or new entrant bidding credits in EBS auctions. See 47 C.F.R. § 73.5007 (2003).

⁶ Even if the Commission were inclined to reverse itself on the bidding credit issue (and the Joint Parties reiterate that no such reversal is warranted), it must remain cognizant of its prior finding in the *ITFS Auction MO&O* that "any bidding credit or other special measures adopted for [EBS] auctions should reflect the nature and purpose of this instructional service." *ITFS Auction MO&O*, 14 FCC Rcd at 8767. Thus, any bidding credits must seek to promote education, not to promote the interests of entities with limited revenue that may or may not be advancing education.

WHEREFORE, for the reasons set forth above, the Joint Parties request that the Commission make clear that it will address in WT Docket No. 03-66, and not in this proceeding, the rules and policies that will govern the EBS White Space Auction.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION INTERNATIONAL, INC.

By: /s/ Andrew Kreig
Andrew Kreig
President

1333 H Street, NW
Suite 700 West
Washington, DC 20005
(202) 452-7823

NATIONAL ITFS ASSOCIATION

CATHOLIC TELEVISION NETWORK

By: /s/ Todd D. Gray
Todd D. Gray

Dow Lohnes & Albertson, pllc
1200 New Hampshire Ave., N.W.
Suite 800
Washington, DC 20036-6802
(202) 776-2571
Counsel for NIA

By: /s/ Edwin N. Lavergne
Edwin N. Lavergne

Fish & Richardson P.C.
1425 K Street, N.W.
Suite 1100
Washington, DC 20005-2004
(202) 626-6359
Counsel for CTN

February 24, 2006